IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 108 of 1991

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

UMIYA RAJU MADRASI

Versus

STATE OF GUJARAT

Appearance:

MR DG BHATT, for MR RR MARSHALL for Petitioner

MR ST MEHTA APP for Respondent.

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 10/11/2000

CAV JUDGEMENT

This Criminal Revision Application is filed by original accused no.1 in Criminal Case No. 2938 of 1985 on the file of the learned Judicial Magistrate, First Class, 1st Court, Surat (who will be referred to as the

learned Magistrate) under Sec.401 of the Criminal Procedure Code, 1973 read with Sec. 397 of the Criminal Procedure Code, 1973, challenging correctness, legality and propriety of the judgment Ex.11 rendered on 27th December, 1990 by the learned Additional Sessions Judge, Surat (who will be referred to as the learned Appellate Judge) in Criminal Appeal No. 34 of 1998.

2. The learned Magistrate, by rendering his judgment Ex. 56 in Criminal Case No. 2938 of 1985 convicted accused no.1 (revision petitioner) and accused no.2 (revision opponent No.1) under Sec. 248 of the Criminal Procedure Code and convicted both of them for offences punishable under Secs. 147-149-336-337 of the Indian Penal Code and by this judgment Ex.56 dt. 25th April, 1988, accused no.1 was convicted for offences punishable under Secs. 147 and 149 of the Indian Penal Code and for each of said two offences, he was sentenced to undergo R.I. for one month and to pay a fine of Rs.100/- and i/d of fine, further sentenced to undergo S.I. for two days. For each of two offences punishable under Secs. 336 and 337 of the Indian Penal Code, accused no. 1 was sentenced to undergo R.I. for 15 days and to pay a fine of Rs.50/- and i/d. of fine, further sentenced to undergo Simple Imprisonment for one day.

2.1. By aforesaid judgment, accused no.2 had been sentenced for the offences punishable under Secs. 147 and 149 of the Indian Penal Code and for each of said two offences, he was sentenced to undergo Simple Imprisonment for 10 days and to pay a fine of Rs.100/- and i/d to undergo further Simple Imprisonment for two days. Accused no.2 was also convicted for offences punishable under Secs. 336 and 337 of the Indian Penal Code and for each of the two offences, he was sentenced to undergo Simple Imprisonment for five days and to pay a fine of Rs.50/- and i/d. to pay a fine, to undergo further Simple Imprisonment for one day.

3. Accused no.2 challenged the said Judgment and order of conviction and sentence rendered by the learned Magistrate, Surat by preferring Criminal Appeal No.34 of 1998 to the Sessions Court, Surat, and the learned Appellate Judge by rendering his Judgment Ex.11 on 27/12/1990 dismissed the appeal of the accused no.1 and confirmed the order of conviction and sentence passed by the learned Magistrate. Accused has not challenged the Judgment of the Appellate Court by preferring any Criminal Revision Application to this Court.

4. In this Criminal Revision Application, the

revision -petitioner was the accused no.1, whereas revision -opponent no.1 was accused no.2 in aforesaid Criminal case No.2938 of 1985. The revision -opponent No.2 is the State of Gujarat i.e. the Prosecution. In aforesaid case, the complainant was Balikaransinh Mahaevsinh who had lodged a complaint in the Police Station, and therefore, the parties will be referred to hereinafter as the complainant, accused and prosecution respectively, at appropriate places.

5. The facts leading to the present Criminal Revision Application, in a nut shell, are as follows:-

On or about 7th July, 1985 during the period between 7-40 p.m. and 7-45 p.m. original complainant Balikaransinh Mahadevsing residing in Zupadpatti near Lambe Hanuman, Narsinh Temple in the city of Surat lodged his complaint in Varachha Police Station, and as per that complaint, at about 7-15 p.m., accused nos. 1 and 2 in company of other four accused pelted stones indiscriminately on complainant and persons residing in the same area in which complainant is residing and in that incident, witnesses Jagaram Ayodhyaprasad, Lalsing Mahadev, Chhotalal Ramkul and other residents of that area were seriously injured. As per the case of complainant, present revision- petitioner, revision opponent no.1 and other four persons namely Jashwant, Munna, Ramesh and Salim were present in that group of accused. It is the case of the prosecution that aforesaid six persons formed an unlawfully assembly of whose common object was by means of using criminal force to compel the complainant to allow them to hide the stolen coal being the property of the Railway, near the house of the complainant and being a member of unlawful assembly, all the said six accused, by pelting stones indiscriminately on the persons of the complainant's side and his witnesses so rashly and negligently as an endanger to human life for his personal safety and they by committing such act, caused injuries to the complainant and other witnesses. Thus, it is the case of the complainant that all the accused being members of an unlawful assembly have committed offences punishable under Secs. 147-149-336 and 337 of the Indian Penal Code.

6. On the basis of that complaint lodged in the Police Station, the Investigating Officer carried out investigation and ultimately, chargesheet was filed against two accused namely revision- petitioner and revision- opponent no.1, because other four accused were absconding then and they could not be traced out till

chargesheet was filed in the Court of the learned Magistrate. That chargesheet filed against only two accused came to be registered as Criminal Case No. 2938 of 1985. The learned Magistrate framed charge at Ex.4. Accused pleaded not guilty to the charge. Thereafter, prosecution examined seven witnesses in support of the case of the prosecution. Prosecution also led documentary evidence through the witnesses examined in the case. Thereafter, after hearing the arguments of the learned advocates of both the parties, and after perusing and appreciating evidence led by the prosecution, the learned Magistrate accepted the case of the prosecution and on 25/4/1988, by rendering his Judgment Ex.56 in Criminal Case No. 2938 of 1985, he convicted and sentenced both the accused for offences punishable under Secs. 147-149-336 and 337 of the Indian Penal Code, as said in Para 2 hereinabove.

7. Being aggrieved against and dissatisfied with the Judgment Ex.56 of conviction and sentence, rendered by the learned Magistrate, present revision- petitioner who was accused no.1 in that case preferred Criminal Appeal No.34 of 1988 to the Court of the learned Sessions Judge, Surat. In that appeal, the learned Appellate Judge heard the arguments of the learned advocates for both the parties and after perusing the record and proceedings of case and after appreciating an evidence led by the prosecution, he rendered his Judgment Ex.11 on 27/12/1990 and by that Judgment, the appeal preferred by accused no.1, was dismissed, meaning thereby the Judgment Ex.56 dated 25/4/1988 of conviction and sentence rendered by the learned Magistrate, was confirmed.

8. Being aggrieved against the said Judgment Ex.11 dt. 27th December, 1990 rendered in Criminal Appeal No.34 of 1988 by the learned Appellate Judge, original accused no.1 has preferred this present Criminal Revision Application. It may be noted that during pendency of this Criminal Revision Application, at the request of the learned advocate for the petitioner, name of revision/opponent no.1 was deleted by this Court (Coram: B.J.Shethna, J.), on 4/3/1991. Hence now this present Criminal Revision Application is with regard to accused no.1 only.

9. Before this Criminal Revision Application was taken up for final hearing, the learned advocate Shri D.J.Bhatt furnished a paper book containing copies of depositions of four witnesses.

10. Heard Shri D.J.Bhatt, the learned advocate for

the revision petitioner and Shri S.T. Mehta, the learned APP for revision - opponent no.2 -State of Gujrat in detail at length.

11. It would be profitable to state herein the scope and ambit of such type of Criminal Revision Application.

11.A In case of BANSI LAL AND OTHERS Vs. LAXMAN SINGH, reported in AIR 1986 SUPREME COURSE 1721, it has been held that-

" It is only in glaring cases of injustice resulting from some violation of fundamental principles of law by the trial Court, that the High Court is empowered to set aside the order of the acquittal and direct a retrial of the acquitted accused. From the very nature of this power, it should be exercised sparingly and with great care and caution. The mere circumstance that a finding of fact recorded by the trial Court may in the opinion of the High Court be wrong, will not justify the setting aside of the order of acquittal and directing a retrial of the accused."
accused."

11.B In case of STATE OF KERALA Vs. PUTTHUMANA ILLATHJATHAVEDAN NAMBOODIRI reported in (1999) 2 SCC 452, it has been held in Para 5 on Page 454 as follows :-

"In its revisional jurisdiction, the High Court can call for and examine the record of any proceedings for the purpose of satisfying itself as to the corrctness, legality or propriety of any finding, sentence or order. In other words, the jurisdiction is one of supervisory jurisdiction exercised by the High Court for correcting miscarriage of justice. But the said revisional power cannot be equated with the power of an appellate court nor can it be treated even as a second appellate jurisdiction. Ordinarily, therefore, it would not be appropriate for the High Court to reappreciate the evidence and come to its own conclusion on the same when the evidence has already been appreciated by the Magistrate as well as the Sessions Judge in appeal, unless any glaring feature is brought to the notice of the High Court which would otherwise tantamount to gross miscarriage of justice.

12. In Full Bench decision of NARAIN PRASAD Vs. THE STATE OF RAJASTHAN AND ANOTHER, reported in AIR 1978 RAJASTHAN, 162, in Para 25, it has been held that-

" The revisional jurisdiction is normally to be exercised only in exceptional cases where there is a glaring defect in the procedure or there is a manifest error of point of law and consequently there has been a flagrant miscarriage of justice."

13. In case of RAMU ALIAS RAM KUMAR AND OTHERS VS. JAGANNATH, reported in AIR 1994 SUPREME COURT 26, it has been held that-

" It is well settled that the revisional jurisdiction conferred on the High Court should not be lightly exercised particularly when it was invoked by a private complainant."

14. Keeping in mind aforesaid legal position, contention taken by Shri D.J.Bhatt are considered.

15. By reading the depositions of witnesses, Shri D.J.Bhatt has tried to magnify so called contradictions and discrepancies from the depositions of the witnesses. It may be noted that the learned Magistrate had the advantage of observing the manner in which the witnesses gave their evidence. In case of MADHUSUDAN DAS Vs. SMT. NARANANIBAI AND OTHERS, reported in AIR 1983 SC 114, it has been held that

" General rule is that the appellate court should permit the findings of fact rendered by the trial Court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial Court or there is a sufficient balance of improbability to displace its opinion as to whether the credibility lies".

16. Here in this case, there is a concurrent and consistent findings of both the courts below on the point that accused no.1 is guilty for offences punishable for which he has been convicted and sentenced. I had read the evidence of witnesses in between the lines and I find no contradiction or discrepancy in the evidence, which can be said to be significant and relevant and I find that these contradictions cannot be said to be material contradictions to disbelieve the case of the Prosecution,

and therefore, this Court is at loath to disturb the finding of fact arrived at by both the courts below, and therefore, on the basis of evidence, this Court finds that finding of both the courts below cannot be said to be perverse.

17. Shri Bhatt has argued that in case before the trial Court only two accused were before the Court and trial ended in conviction, and therefore, it cannot be said that two accused formed unlawful assembly. It may be noted that the complainant has from very beginning stated in his complaint that along with these two accused, four other accused were there. It is an admitted fact that because of the fact that rest of four accused were absconding, chargesheet could not be filed against that four accused, and therefore, the contention of Shri Bhatt that two accused can not form unlawful assembly, cannot be accepted.

18. He has further argued that there is no mention of Sec.149 of I.P.Code in the chargesheet. If we read Para 7 of the Judgment rendered by the Appellate Court, we find that he has dealt with this contention with regard to non-mentioning of Sec.149 of I.P.Code in the charge, and he has assigned the reasons for rejecting the said contention taken by him. Still however, looking to provisions of Sec. 464 of Criminal Procedure Code, no finding with regard to sentence or order of conviction passed by court of competent jurisdiction shall be deemed to be invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge. As observed by the learned Appellate Judge in Para 7 of his Judgment, all the facts were stated in charge, and therefore, merely because figure of Section of Indian Penal Code is not stated in the charge, benefit cannot be given to accused, and therefore, this contention is also negatived.

19. Shri D.J.Bhatt has argued that there was no mens rea or guilty mind for forming unlawful assembly by the accused. In complaint itself, the complainant has stated that accused wanted to hide stolen coal of the property of Railway in lane of Zupadipatti, where the complainant is residing and the complainant objected to give co-operation to accused for such illegal act, and hence because of that opposition from complainant, the accused no.1 in company of five accused started to pelt stones indiscriminately on complainant and witnesses examined by the prosecution, and all were seriously injured. In this case, they were examined by Medical Officers. Prosecution has examined two Doctors who had issued

Medical Certificates and that Medical Certificates are duly proved by the Medical Officers. Thus common object of the accused is also proved to the satisfaction of the Court and looking to evidence, discussed by both the Courts below, this Court finds that there is no merit in the contention taken by Mr. D.J.Bhatt that mens rea or guilty mind, is not proved.

19.1 He has argued that common object is not proved but considering entire evidence of the prosecution, common object is also proved. He has cited one authority of RADHEY SHYAM KHEMKA AND ANOTHER vs. STATE OF BIHAR, reported in (1993) 3 SCC 54 and in view of this authority, as per Sec.40 of Indian Penal Code, for an offence within the meaning of Sec.40 of Indian Penal Code, mens rea is necessary. For Secs. 336 and 337, intention cannot be there on part of the accused to inflict injuries on the witnesses. Mere rash and negligent act is sufficient to prove offence under Secs. 336 and 337 of the Indian Penal Code. There are so many offences punishable under Indian Penal Code in which mens rea cannot be expected on part of the accused. The acts which are committed rashly or negligently are punishable under Indian Penal Code, but for such act, intention cannot be there, because any negligent act, presence of knowledge or intention is absent, and therefore, looking to the offence for which accused is punishable under the provisions of Indian Penal Code, there cannot be any intention or guilty mind because act itself shows that accused committed that act rashly or negligently, and therefore, this contention is also negatived by this Court.

20. He has argued that there is no evidence to connect the accused with the crime because complainant has not stated as to by which stones thrown by which accused, he was injured. When there is a charge of unlawful assembly, then for illegal act committed by one accused, other accused who has not done anything can be held liable with a doctrine of vicarious liability, and therefore, it is not necessary as to by whose stone who was injured. As held in case of THE STATE OF MAHARASHTRA vs. JOSEPH MINGEL KOLI AND ORS. reported in (1997) 2 CRIMES 228, once a membership is established, it is not incubent upon the prosecution to establish whether any special overt act has been assigned to any accused. Mere membership of unlawful assembly is sufficient and every member of unlawful assembly is vicariously liable for the act done by others either in prosecution of the common object of unlawful assembly or that such acts by members of unlawful assembly were likely to be committed".

21. Here in this case, all the six accused came together near house of the complainant and for the object which is stated hereinabove, they indiscriminately started to pelt stones on the group of witnesses including complainant and because of pelting of stones, complainant and his witnesses sustained injuries which were noticed by the Doctors who have issued Medical Certificates and therefore this contention cannot be accepted.

22. Shri D.G.Bhatt has argued that incident took place in the year 1985 and no purpose would be served to send the persons in Jail after about 15 years and for this he has cited an authority of N.M.PARTHASARATHY vs. THE STATE OF BY S.P.E., reported in AIR 1992 SC 988. In that case, 25 years had passed when the matter was decided by the Hon'ble Supreme Court and in facts of that case, the Hon'ble Supreme Court thought it fit not to send the accused in Jail. He has argued that the learned Magistrate ought to have given a benefit of probation under Sec.360 of the Criminal Procedure Code, 1973. He has argued that revision petitioner is not habitual offender or history -sheeter, and therefore, this Court should show leniency to revision petitioner by giving benefit of probation under Sec.360 of the Criminal Procedure Code. It may be noted that learned Magistrate has examined possibility of giving benefit of probation under Sec.360 of the Criminal Procedure Code. He has given reasons for not giving benefit of probation to the accused no.1. After all, the question of quantum of sentence involves discretion of the Court. Merely because 15 years have passed, this Court should not disturb finding on the point of quantum of sentence arrived at in exercise of judicial discretion by the lower court.

23. Shri D.G.Bhatt has argued in such a way that he invited this Court to reappreciate the evidence of the witnesses examined by the learned Judge of the trial Court. There is no just and reasonable cause for disturbing quantum of sentence. The learned magistrate has from the very beginning taken a lenient view for accused no.1 and he has not inflicted sentence as per maximum sentence prescribed in respective Sections of Indian Penal Code for which accused no.1 is convicted. When both the courts below have analysed and appreciated the evidence in its true and correct perspective and in the manner in which the evidence ought to have been appreciated, this Court finds that there is no cogent reason to give contrary finding on the basis of same

evidence, and therefore, an attempt made by Shri Bhatt requesting for reappreciation of evidence cannot be encouraged, and therefore, this court is of the view that this is not a case in which this Court should interfere with the finding of quantum of sentence.

24. In view of the discussion made hereinabove, this Criminal Revision Application deserves to be dismissed and accordingly, it is dismissed. Rule is discharged. The bail granted to the revision petitioner by the order of this Court dated 8/2/1991 shall stand cancelled forthwith. Revision Petitioner is directed to surrender before the trial Court to serve out the sentence as per Judgment Ex.56 dt. 25/4/1988 rendered in Criminal Case No. 2938 of 1985 within two months from the date of receipt of writ from this Court.

Office is directed to send back Record and Proceedings, if they are called for, forth-with, without any delay.

Date: 10/11/2000. (H.H.MEHTA,J.)
ccshah